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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED JUNE 21, 1930.

(35,132)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1930

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Thursday, May 22, 1930.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Henry C. W. Laubenheimer, Marshal; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

4291

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

STATEMENT OF FACTS

On this appeal certain questions of law have arisen concerning which this Court is in doubt, and desires the instruction of the Supreme Court of the United States. We find, and counsel for the parties agree, that the relevant facts out of which the legal questions grow are:

Appeal was taken to this Court from a decree entered November 5, 1929, by the District Court for the Northern District of Illinois, Eastern Division, perpetually enjoining appellants from the threatened operation of the broadcasting station theretofore, prior to September 1, 1928 operated by them under the call letters WMBB-WOK, until said appellants should obtain a new license issued under and in accordance with the Radio Act of 1927, as amended, authorizing the operation of said station. Subsequent to Septem-

ber 1, 1928 and prior to the institution of this suit, appellants had openly announced their intention to resume operation of their station on the frequency (1190) kcs.) and with the power (5000 watts) which had been formerly used by the station. It is admitted by appellants that operation by this station on this frequency and with this power would have been resumed on Monday, October 22nd, but for the filing of this suit. An injunction pendente lite restraining the operation of the station was made final by the decree from which this appeal is taken. The enjoined station is located at Homewood, Illinois, about 25 miles south of Chi-
[fol. 2] cago. The transmitter has a maximum power of 20,000 watts and is of the type used in the operation of a broadcasting station.

On April 3, 1925, the appellant, Trianon, Inc., was licensed by the Secretary of Commerce to operate a radio station of 500 watts power, under the call letters WMBB. On May 5, 1925 this license was succeeded by one issued to American Bond & Mortgage Company to operate said transmitter for a period of three months, using the call letters WMBB, same power. Thereafter licenses were issued up to and including February 23, 1927. Thereafter, during the period from February 23, 1927 to September 28, 1927 licenses were granted by the Federal Radio Commission. From May 25, 1925 to June, 1927 appellant was authorized to use the frequency of 1200 kcs. and thereafter from June, 1927 to September 28, 1927 the frequency of 1190 kcs. with 500 watts power. Appellant shares time on this frequency with station WOK.

On July 27, 1925 the Secretary of Commerce issued a license to a corporation known as Neutrowound Radio Manufacturing Company to operate a 500 watts transmitter at Homewood, Illinois, under the call letters WOK. On November 13, 1925 this license was succeeded by another license issued to operate a new transmitter on the same premises with a power of 5000 watts, using the call letters WOK, which license was renewed until February 23, 1927, and thereafter by the Federal Radio Commission until April 27, 1927.

On the last mentioned date Trianon, Inc. acquired said station from Neutrowound Radio Manufacturing Company for a valuable consideration, together with all legally

assignable rights to the use of call letters WOK. The license to the Neutrowound Manufacturing Company was on its expiration date replaced by a license to the appellant Trianon, Inc. Thereafter the Commission, from time to time issued successive licenses to appellant, Trianon, Inc., to opérate said 5000 watts transmitter until September 28, 1927, with a daily division of time with station WMBB. During the period from April 22, 1927 to September 28, 1927 the two stations WMBB and WOK, while they nominally divided time, were to a large extent operated as one station with a continuous broadcasting service, the appellants American Bond & Mortgage Company and Trianon, Inc. being in close financial relation to each other.

[fol. 3] On or about August 3, 1927 the Federal Radio Commission issued a construction permit to the appellant, American Bond & Mortgage Company for the construction of a new transmitter with a maximum power of 20,000 watts, pursuant to a finding by the Commission that public interest, convenience or necessity would be served by the construction of such station. Upon the completion of the construction of the new station the Commission, on or about September 28, 1927 issued a license to appellant, American Bond & Mortgage Company authorizing it to operate said transmitter on full time until October 14, 1927, on a frequency of 1190 kcs. with 5000 watts power, which license was by a later order of the Commission extended to November 1, 1927. On November 1, 1927 pursuant to written application, the Commission granted appellant, American Bond and Mortgage Company a license authorizing it to operate said transmitter for a further period of 60 days on the same frequency and power, and this last mentioned license was extended from time to time, until it finally expired on September 1, 1928, a renewal beyond said last mentioned date having been refused by the Federal Radio Commission as hereinafter set forth.

Pursuant to the Joint Resolution of Congress approved December 8, 1926, appellant, American Bond and Mortgage Company, filed with the Secretary of Commerce on January 24, 1927, in connection with and as part of an application which it was then making for renewal of its license to operate Station WMBB, a signed written waiver of

"any right or any claim of right as against the United States, to any wave length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

The record does not show whether the Neutrowound Radio Manufacturing Company filed a similar written waiver with respect to Station WOK.

In all applications for license or renewal of license filed by either appellants after February 23, 1927 (including the application for renewal of January 13, 1928, hereinafter mentioned, which was denied by the Federal Radio Commission), was contained a written waiver by the applicant

"of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Each of the licenses and renewal licenses issued by the [fol. 4] Commission to either appellant (including the license which with extensions covered the period from November 1, 1927 to September 1, 1928, and renewal of which was denied by the Commission) contained the following condition:

"This station license shall not vest in the license any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein."

On January 13, 1928, appellant duly filed an application for a renewal of the license then held by it (for 5000 watts on 1190 kcs. full time). This license originally covered a period of sixty days, beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928.

On May 23, 1928, the Commission entered its General Order No. 32, which recited that the Commission, after examination of the license applications of the applicants named therein, including appellant, American Bond and

Mortgage Company, was not satisfied "that public interest, convenience or necessity would be served by granting these applications," and fixed the date of July 9, 1928 at ten o'clock, A. M., in its offices at Washington, D. C. as the time and place for hearing on each of the applications, which were 164 in number. The Commission mailed a copy of its order to appellant, American Bond and Mortgage Company accompanied by a letter stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

On July 9, 1928, appellants appeared before the Commission by counsel, as did a large proportion of other stations included in the Order, the hearing on appellants' application being held partly on July 19, 1928 and partly on July 23, 1928. On August 31, 1928 the Commission took action with reference to said appellants' application by rendering the following order:

"The Commission having considered the evidence and the arguments presented to it in the above entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application,

"It is ordered, that said application be, and the same [fol. 5] is hereby denied; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

Federal Radio Commission, by Ira E. Robinson, chairman."

Dated August 31, 1928.

Prior to September 1, 1928, appellants had expended on the Homewood transmitter, sums aggregating $100,000.00. The market for the transmitter and incidental equipment is so limited that appellants will be unable to realize from the sale thereof more than a small part of the money invested therein, in fact not more than what would commonly be regarded as its junk value. Appel-

lants have placed certain expensive improvements upon the real estate to house the transmitter; these improvements are designated and particularly adapted for use in connection with the radio broadcasting station and consequently said real estate cannot be sold without a very substantial loss with respect to such improvements. In addition, appellants claim that their radio broadcasting business included a going value and a good will of its radio audience attaching to the call letters WMBB-WOK, to the frequency of 1190 kcs. used in broadcasting their programs, and to the programs themselves. It appears that the programs broadcast by appellants consisted mainly of entertainment (chiefly music) and of talks and addresses on various subjects. During the first eight months of 1928 appellants expended a sum in excess of $23,000.00 for services of employees exclusively for the operation of their station. While there have been occasional instances when appellants have sold time on their programs to advertisers, the revenue from the sale of such time has been of so small an amount as to be practically negligible. Appellants state that:

"Their purpose has at all times been to maintain these stations as a service to the public, and that the only return which they have received or expected to receive, has been from the good will of their patrons and listeners resulting from the high quality of programs which they have broadcast."

Appellant, American Bond and Mortgage Company, is engaged in operating an investment service to a large number of investors in all parts of the United States, both within and without the borders of the State of Illinois, and in selling to such investors bonds, mortgages and other [fol. 6] securities. Appellant, Trianon, Inc., is engaged in the operation for profit of two large public ballrooms in the City of Chicago.

By General Order 40 of the Federal Radio Commission adopted on August 30, 1928, the frequency of 1190 kcs. was designated as a cleared channel (to be used by only one station at a time in evening operation and that to be of substantial power of 5000 watts or more) and was assigned to the Third Zone, as established by Section 2 of the Radio

Act of 1927, and pursuant to the equalization requirements of Section 5 of the Amendatory Act of March 28, 1928. Since November 11, 1928, certain Texas broadcasting stations (WRR and WOAI), which had theretofore operated on other frequencies, have, on a division of time between them, operated exclusively on the frequency of 1190 kcs. with power of 5000 watts each. The operation of appellants' station on this frequency would cause such interference with reception of programs from the Texas stations, and their operation would cause such interference with reception of programs from appellants' station, that the area served with satisfactory reception from either station would be reduced to a small area in the vicinity of each station if they were permitted to operate simultaneously on the same frequency. Appellants state, however,

"that in the event it shall become in the future impossible to broadcast on a frequency of 1190 kcs. in such manner as to satisfactorily transmit their programs to their listeners and patrons, they claim the right to broadcast on such other frequency as will enable them to reach said patrons and listeners, so long as such wave length shall not interfere with interstate commerce or the lawful regulation of the Government for the protection thereof."

There is, however, no frequency in the entire band of 90 frequencies or channels available for use by broadcasting stations in the United States on which appellants' station can be permitted to operate without seriously interfering with reception of programs from some one or more broadcasting stations now in operation under licenses from the Federal Radio Commission and without very substantially reducing the areas served by such stations with satisfactory reception.

Questions Certified

Question 1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified [fol. 7] transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed, and the land whereon the same was located,

and continuously broadcasted therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission, and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 3. If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such property rights, is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of December 8, 1926 or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by sub-paragraph (a) of Section 11, of the Radio Act of 1927, as amended

Question 4. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commis-

sion, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards pro- [fol. 8] vided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 5. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Act of March 28, 1928 amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 6. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

The Clerk of this Court is hereby directed to transmit a certified copy hereof to the Supreme Court of the United States.

[fol. 9] Clerk's certificate to foregoing certificate omitted in printing.

Endorsed on cover: File No. 35,132. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 210. American Bond and Mortgage Company and Trianon, Inc., vs. United States of America. (Certificate.) Filed June 21, 1930. File No. 35,132.

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UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

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MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General, pursuant to Rule 20, paragraph 6, of this Court, moves to advance the above-entitled case for hearing immediately following the case of *White* v. *Johnson,* No. 29, October Term, 1930.

Prior to the enactment of the Radio Act of 1927, c. 169, 44 Stat. 1162, American Bond and Mortgage Company and Trianon, Inc., hereinafter called appellants, acquired and continuously operated under successive licenses from the Secretary of Commerce a radio broadcasting station. After the enactment of the Radio Act of 1927 appellants expended substantial sums in replacing old apparatus

with new under the authority of a construction permit from the Federal Radio Commission and thereafter continuously broadcast with the new apparatus under successive licenses issued by the Federal Radio Commission. The Commission on August 31, 1928, after a hearing, issued an order effective September 1, 1928, denying appellants' application for a renewal of a license to broadcast. Appellants later openly announced their intention to resume operation of their broadcasting station and the United States thereupon filed this suit in equity to enjoin them from operating their station until they should obtain a new license issued under and in accordance with the Radio Act of 1927. The District Court entered a final decree perpetually enjoining such operation. On appeal to the Circuit Court of Appeals for the Seventh Circuit that court certified certain questions to this Court, asking whether appellants acquired a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States; and if so, whether the action of the Federal Radio Commission taken in conformity with the Radio Act of 1927 and with the amendatory Act of March 28, 1928, c. 263, 45 Stat. 373, commonly known as the Davis Amendment, constituted a taking of property without due process of law or a taking of private property for public use without just compensation, contrary to the provisions of said Fifth Amendment.

In *White* v. *Johnson, supra,* the Federal Radio Commission did not refuse a broadcasting license but materially reduced the operating power of a broadcasting station, and the Circuit Court of Appeals for the Seventh Circuit has certified to this Court substantially the same questions of law as those which it has certified in this case.

An early decision by this Court upon the questions certified is of general public interest because such decision will determine the constitutionality of important provisions of the Radio Act of 1927 and of the Davis Amendment authorizing the Federal Radio Commission adequately to regulate radio broadcasting and communication.

Opposing counsel concur in this motion to advance.

THOMAS D. THACHER,
Solicitor General.

AUGUST, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930